In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1427

AVELL C. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the sufficiency of the evidence to support his conviction and the admissibility of certain evidence at trial.

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted, along with co-defendants John H. Young and Grady McLeod,[1] on four counts involving the smuggling of heroin and cocaine, and conspiracy, in violation of 21 U.S.C. 841(a)(1), 846, 952, 960, 963. He was sentenced to four concurrent terms of three years'

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[1] Young's petition for a writ of certiorari has been denied (No. 72-959, March 5, 1973) and McLeod's is pending (No. 72-6372, this Term).

imprisonment (Tr. 539).[2] The court of appeals affirmed *per curiam* (Pet. App. A.).

1. Petitioner contends that the evidence was insufficient to support his conviction. As the following facts reveal, however, there was clearly sufficient evidence for the jury to conclude that he was a part of a conspiracy to smuggle narcotics into the United States.

Willie Tusan, Jr., a narcotics investigator for the Los Angeles Police Department, began surveillance of petitioner and the other defendants in December of 1968, and observed them in the presence of each other prior to May 21, 1971 (Tr. 312-314). Kenneth Jefferson, a defendant and co-conspirator, testified that on May 21, 1971, he was called over to defendant John H. Young's house and, in the presence of defendant Grady McLeod, was offered $200 for the use of his car to "make a run" (Tr. 231-232). After he had agreed to the deal, Young made two telephone calls. He told the first person that he would be over in a few minutes, and he told the second person to meet him at petitioner's house. After the calls, Jefferson, Young, McLeod, and one Barnett, who had just arrived, drove over to petitioner's house (Tr. 232-234).

At petitioner's house, officers Tusan and Stirwalt had set up a surveillance. Upon arriving at petitioner's house, Jefferson parked his car in the driveway. Petitioner came out and brought a hand drill and an extension cord from his garage which he carried over to the left front door of Jefferson's car and gave to the other defendants. He conversed briefly with them before return-

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[2] "Tr." refers to the transcript of the proceedings below, a copy of which is a part of the record filed in this Court.

ing to the house (Tr. 235, 384-385). The others removed the kick plate from the left front door of the car and began making a secret compartment—a "stash" (Tr. 235-236). Petitioner came out of his house once, stood close to where the work was being done on the car, and talked with the other defendants (Tr. 237-238, 321-322). He also picked up a tool box which was lying on the ground, and took it into the house (Tr. 308-309). During the time the work was going on, the defendants talked about what a big kick plate it was, and that it would make a good stash (Tr. 236-237). Defendants Barnett and Jefferson each went into petitioner's house once during the time that the work was going on (Tr. 238).

The defendants completed the work and had all left petitioner's house by 2:30 or 3:00 p.m. (Tr. 326, 338, 381, 386, 391-396, 400, 427). At 3:24 p.m. a three-minute, direct dialed, station-to-station telephone call was placed from the telephone at petitioner's residence to Tijuana, Mexico (Tr. 454-456).

Later that night, Jefferson and Barnett went to Tijuana, picked up the heroin and cocaine, hid it in the recently built compartment in Jefferson's car, and returned to the United States where they were apprehended at the border by the waiting narcotics agents (Tr. 244-250).

The next afternoon, at about 1:00 or 2:00 p.m., petitioner was arrested and his house and yard were searched pursuant to a search warrant (Tr. 332-333). In a trash can 15 feet from petitioner's driveway, the officer found a Sears paper bag,[3] general purpose cut-

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[3] Defendants Young and Barnett had purchased a round circular carbide saw blade at Sears while work was in progress on the secret compartment (Tr. 323, 324, 430-432).

ting wheels, containers for these cutting wheels, several metal fragments, and a broken drill bit (Tr. 484-487, 492).

Petitioner contends that the evidence merely showed that he associated with the other defendants. On the contrary, it showed that he was a part of the plan to smuggle narcotics. He knew the other defendants prior to May 21, 1971, and he was told that they were coming over to his house on that day (Tr. 233-234). When they arrived, he went directly to his garage and brought out a hand drill, although they had not as yet had any chance to request it. Clearly, he knew why they were there before they arrived. For about 5 or 10 minutes (Tr. 290), he stood no more than a few feet from where they were working on the secret compartment, and he talked with them. It is unreasonable to believe that he did not know the intended use of the compartment. Added to this evidence is the fact that shortly after the other conspirators left his house, a long-distance phone call was made from petitioner's house to Tijuana, where two of the conspirators picked up the narcotics later that night. On the basis of this evidence, the jury had sufficient support for a finding of guilt.

2. Petitioner further contends that certain evidence was erroneously admitted at trial. He claims that the statements of the co-defendants were inadmissible hearsay as to him. However, the statements were made during the conspiracy and in furtherance thereof, and were admissible under the co-conspirator exception to the hearsay rule. *E.g., Dutton* v. *Evans,* 400 U.S. 74. The government need not prove the conspiracy before the statements may be admitted; the order of proof is entirely within the discretion of the trial court. *United States* v. *Knight,* 416 F. 2d 1181, 1185-1186 (C.A. 9);

Nelson v. *United States,* 415 F. 2d 483, 487 (C.A. 5), certiorari denied, 396 U.S. 1060; *United States* v. *American Radiator and Standard Sanitary Corp.,* 433 F. 2d 174, 195 (C.A. 3), certiorari denied, 401 U.S. 948.

The telephone bill, showing the long-distance call to Tijuana, was properly admitted in evidence. As the court below found, the circumstantial evidence connecting petitioner with the call was adequate foundation for its admission. The fact that it was made shortly after the secret compartment was completed, and that later that night the "run" was made to Tijuana, made the call relevant.

3. Petitioner's claim that two comments by narcotics agents during the trial were so prejudicial as to constitute reversible error is without merit. One statement was made by Officer Tusan in describing his background research on the defendants: "I also verified two other associates of the original names of the alleged peddlers" (Tr. 313). Young's attorney moved to strike the testimony, and the court struck the portion relating to the "alleged peddlers" and admonished the jury to disregard it (Tr. 313). Officer Tusan's reference to "alleged peddlers" was ambiguous, but even assuming he meant the defendants, there is nothing inaccurate or prejudicial in referring to defendants, who had been under surveillance, as "alleged peddlers." Moreover, the jury was admonished not to consider the remark.

The second statement was made by Officer Hayes in reply to a question concerning his duties: "I investigate people who are in the business of selling dope." (Tr. 430). He was referring to his duties in the abstract, and he did not refer to any of the defendants in particular. When this statement is considered in the context of his limited testimony and the entire trial record, it is clear

that the court below correctly concluded that his statement "cannot have had a substantial influence on the jury verdict in this case" (Pet. App. A-3). There is no reason for this Court to review that conclusion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.

DOJ-1973-06